

FEDERAL ELECTION COMMISSION
999 E Street, NW
Washington, D.C. 20463

FIRST GENERAL COUNSEL'S REPORT

SENSITIVE

MUR: 5650

DATE COMPLAINT FILED: March 7, 2005

DATE OF NOTIFICATION: March 14, 2005

LAST RESPONSE RECEIVED: January 25, 2006

DATE ACTIVATED: July 6, 2005

EXPIRATION OF STATUTE OF
LIMITATIONS: October 15, 2009

COMPLAINANT:

Bennett S. Kalafut

RESPONDENTS:

University of Arizona, by and through the
Arizona Board of Regents
Associated Students of the University of Arizona
Alistair J. Chapman
Fernando Ascencio
Friends of John McCain and Thomas R.
Holtrup, in his official capacity as treasurer

RELEVANT STATUTE
AND REGULATION:

2 U.S.C. § 441b(a)
11 C.F.R. § 110.13

INTERNAL REPORTS CHECKED:

None

FEDERAL AGENCIES CHECKED:

None

I. INTRODUCTION

This matter concerns a debate hosted by the Associated Students of the University of Arizona ("ASUA") between John McCain and Stuart Starky, the Republican and Democratic nominees, respectively, for U.S. Senator from Arizona in 2004. The complaint alleged that two officers of ASUA admitted to complainant and other witnesses that the ASUA excluded a third candidate on the ballot, Libertarian nominee Ernest Hancock, at the request of either or both of the participating candidates' campaigns. Consequently, the complainant alleged, the

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debate constituted an illegal in-kind contribution from the University of Arizona to the McCain and Starky campaigns.¹

The University is an incorporated public educational institution. *See* Ariz. Rev. Stat. 15-1625 ("the Arizona Board of Regents is a body corporate with perpetual succession. The Board has jurisdiction and control over the [Arizona state] universities"); University Response at 1 (University "under jurisdiction and control of the Arizona Board of Regents"). The University is tax-exempt under 26 U.S.C. § 115 as an "integral part of a government agency." *See* Determination Letter from Internal Revenue Service dated March 31, 1989, attached to the University's Response.

As discussed in more detail below, although this Office concludes that the University did not technically qualify, due to its tax status, as a "debate staging" organization pursuant to the Commission's debate regulation at 11 C.F.R. § 110.13, which applies only to nonprofit organizations described in 26 U.S.C. § 501(c)(3) or (c)(4), given the University's adherence to the substantive aspects of the regulations, we recommend that the Commission exercise its prosecutorial discretion, dismiss this matter and close the file.

II. DISCUSSION

A. Background

On October 15, 2004, the Associated Students of the University of Arizona ("ASUA")²

¹ Starky 04 and its treasurer were not notified of the complaint because the committee was terminated on December 28, 2004.

² The University stated that ASUA is a department of the University with no separate corporate or legal identity. University Response at 1. Thus, "the activities and conduct of ASUA are those of the University itself and the allegations of the Complaint are therefore against the University." *See* University Response at 1-2; *see also Arizona Board of Regents v. Zappia*, 577 P.2d 735, 738 (Ariz. Ct. App. 1978) ("... ASUA has no existence separate and apart from the University of Arizona").

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1 hosted a one-hour televised debate between two Arizona senatorial candidates, incumbent John
2 McCain and challenger Stuart Starky. The debate was moderated by a student panel and held
3 in the University's Gallagher Theatre. There is no dispute that Libertarian senatorial candidate
4 Ernest Hancock was not invited to debate. Complainant alleged that in the presence of himself
5 and other witnesses, respondents Fernando Ascencio and Alastair Chapman, student officers of
6 the ASUA, stated that Hancock was excluded at the request of either the McCain campaign or
7 of both the McCain and Starky campaigns.

8 The Arizona Board of Regents on behalf of the University ("the University") denied
9 complainant's claim that the McCain and/or Starky campaigns were responsible for excluding
10 Hancock from the debate. The University stated "as an instrumentality of the State of Arizona,
11 the University does not endorse, support, or oppose political candidates or political parties."
12 University Response at 2. Moreover, the University contended that even it were deemed a
13 corporation for purposes of the Federal Election Campaign Act of 1971, as amended (the
14 "Act"), it met all the requirements of the Commission's debate staging regulation at 11 C.F.R.
15 § 110.13, which provides an exception to the Act's prohibition on corporate contributions,
16 when it staged the debate between McCain and Starky.

17 The University also provided information concerning the context of the debate and the
18 selection criteria used to select the debate participants. According to the University, "in March
19 2004, ASUA decided that its programs for the 2004 Spring and Fall semesters would be united
20 under one theme, coined 'Civic Engagement,'" and that "ASUA's goals included generating as
21 much student interest in its Civic Engagement program as possible." *Id.* at 3. It asserted that
22 voter registration, education, and voting were the central objectives of the program, and that

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1 "[t]he Education component of the Civic Engagement series involved speeches by various
2 political speakers and one debate on campus, which is the debate at issue in this matter." *Id.*

3 Addressing the debate participant selection criteria, the University stated "the
4 University determined that a debate between McCain and Starky would create the most student
5 interest and attract the greatest number of students to attend the occasion," and "the selection
6 process did not involve any consideration of the candidates' viewpoints." *Id.* According to
7 the University, "[t]he most important consideration was that McCain and Starky both had
8 significant student and voter interest and support, as well as a high level of campaign activity,"
9 whereas "Hancock had little student and voter support, and low campaign activity in
10 comparison." *Id.*³ After setting forth the results of the subsequent general election--76.7% for
11 McCain, 20.6% for Starky and 2.6% for Hancock--that "demonstrate the levels of voter
12 support for each of these candidates," the University's response stated that it had selected
13 McCain and Starky "because they were the significant candidates in this election, and that is
14 why they were chosen to participate in the Debate."

15 The University's response, however, did not address the complaint's allegation that he
16 and others heard two student officers of ASUA state that Hancock was excluded at the request
17 of either the McCain campaign or of both the McCain and Starkey campaigns. Since
18 information concerning this allegation might make the difference between our recommending
19 further action in this matter or dismissal, we invited the University to voluntarily supplement
20 its response to address the allegation, which it did. In its supplemental response, the
21 University clarified the roles played by ASUA and the University in hosting the debate and

³ Hancock neither registered with nor reported to the Commission, and may not have received sufficient contributions or made sufficient expenditures to qualify as a candidate within the meaning of 2 U.S.C. § 431(2).

1 selecting the participants and addressed the alleged statements attributed to the two former
2 ASUA student officers by the complainant. The response explained that the ASUA "student
3 government is a student co-curricular activity at the University, run by students." University
4 Supplemental Response at 1. According to the University, although ASUA students hosted the
5 debate, its officers did not select the participants. Rather, "it was the University
6 administration, in particular the University Advancement Office, that initially selected the
7 candidates, and then provided ASUA with the opportunity to host the debate." *Id.* The
8 University Advancement Office, the University stated, selected McCain and Starky as the
9 debate participants based on the criteria set forth *supra*, and the University flatly denied
10 "exclude[ing] Ernest Hancock from the debate at the request of the McCain and /or Starky
11 campaign committees." *Id.*

12 Addressing the alleged statements that complainant attributed to the two former ASUA
13 student officers, the University stated that Alistair Chapman recalled speaking briefly with the
14 complainant after the debate, but did not recall telling complainant that Hancock was excluded
15 at the request of the McCain or Starky campaigns. Chapman recalled that that the University's
16 Advancement Office selected McCain and Starky, "while ASUA's role was to schedule and
17 host the debate because it fit nicely within the educational debate component of ASUA's Civic
18 Engagement Series." *Id.* at 1-2.

19 The other former student officer, Fernando Ascencio, the University stated, also
20 recalled speaking to the complainant, but remembered that he did not state that Hancock was
21 excluded at the request of the McCain or Starky campaign committees. Rather, Ascencio
22 recalled explaining to the complainant that ASUA merely scheduled the event, but neither he
23 nor ASUA selected the participants. Because Ascencio did not know at the time who had

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1 chosen the participants or the criteria used, he suggested that the complainant contact the
2 campaigns for information concerning why Hancock was not chosen. The University
3 suggested "Ascencio's confusion over who chose the candidates may have unintentionally led
4 to the misunderstanding that underlies the Complainant's Complaint." *Id.* at 2.⁴

5 **B. Analysis**

6 The Act prohibits "any corporation whatever" from making contributions or
7 expenditures in connection with federal elections, or "any candidate" [or] "political
8 committee" from "knowingly [] accept[ing] or receiv[ing]" such contributions. 2 U.S.C.
9 § 441b(a). However, 2 U.S.C. § 431(9)(B)(ii) exempts from the definition of "expenditure"
10 "nonpartisan activity designed to encourage individuals to vote or register to vote," which has
11 been construed to exclude "funds provided to defray costs incurred in staging candidate
12 debates in accordance with the provisions of 11 C.F.R. §§ 110.13 and 114.4(f)" from the
13 definition of "contribution" and "expenditure," respectively. *See* 11 C.F.R. §§ 100.92 and
14 100.154. Section 110.13, in turn, permits "[n]onprofit organizations described in 26 U.S.C.
15 501(c)(3) or (c)(4) and which do not endorse, support, or oppose political candidates or
16 political parties" to "stage candidate debates in accordance with this section and 11 C.F.R.
17 § 114.4(f)." 11 C.F.R. § 110.13(a)(1). The regulations leave the structure of the debate to the
18 discretion of the staging organization, provided that the debates include at least two
19 candidates, the organization does not arrange the debates in a manner that promotes or
20 advances one candidate over another, and the criteria for candidate selection are objective and
21 pre-established, pursuant to 11 C.F.R. §§ 110.13(b) and (c).

⁴ In its response, the McCain Committee stated that, to its knowledge, the University used acceptable and non-partisan standards in determining which candidates to include in the debate, and apparently determined that no candidate other than Senator McCain and Mr. Starky met "any applicable standard for public support and participation in the debate."

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1 The University's McCain-Starky debate included at least two candidates, and the
2 University maintains, and there is no allegation to the contrary, that it was not structured to
3 promote one of those candidates over the other. The University further asserts that it selected
4 the debate participants based on their significant student and voter interest, as well as a high
5 level of campaign activity, in order to promote a goal of ASUA's 2004 Civic Engagement
6 program—specifically, to promote as much student interest in the program as possible.
7 McCain and Starky met these objective criteria, but Hancock did not. Thus, it appears that the
8 University's criteria were both "objective" and "pre-established," as required by section
9 110.13(c), and had Hancock met the criteria, he would have been eligible to participate in the
10 debate. Had Hancock been excluded based on the request of either the McCain or Starky
11 campaigns, as complainant alleged, the exclusion would not have been based on an objective
12 criterion. Here, however, the University asserts that it followed its stated criteria and
13 specifically denies that it excluded Hancock from the debate at the request of the McCain
14 and/or Starky campaigns. Thus it appears that the University complied with the substantive
15 requirements of section 110.13.

16 The University, however, while incorporated, is not a nonprofit section 501(c)(3) or
17 (c)(4) organization eligible to stage debates, as described in section 110.13(a), but instead is
18 tax-exempt pursuant to 26 U.S.C. § 115 as an "integral part of a government agency."⁵
19 Nonetheless, as the University has met all the other substantive criteria for staging debates
20 that would exempt it from section 441b(a) liability, there does not appear to be a good policy

⁵ The McCain Committee and the University contended in their responses that because the University is an instrumentality of the State of Arizona that it should not be deemed a corporation for purposes of section 441b. However, the Act and Commission regulations impose the same proscriptions on "non-traditional" corporations as they do on the more typical corporations. See AO 1977-32 (all corporations, including state and municipal corporations, are subject to the prohibitions of 2 U.S.C. § 441b) and AO 1982-26 (affirming A.O. 1977-32).

reason under the circumstances presented for denying it the benefit of the debate staging regulation based on its tax status alone. Therefore, this Office recommends that the Commission exercise its prosecutorial discretion, dismiss this matter and close the file.

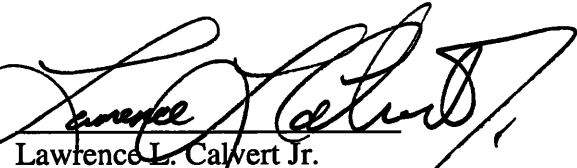
III. RECOMMENDATIONS

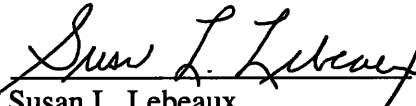
1. Dismiss the complaint in MUR 5650.
2. Close the file.
3. Approve the appropriate letters.


Lawrence H. Norton
General Counsel

2/17/05
Date

BY:


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